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No. 86-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY B. KEENER, *et al.*,
v. *Petitioners,*
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

HOWARD DENNIS, *et al.*,
v. *Petitioners,*
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Respondents.

STANLEY WILMES, *et al.*,
v. *Petitioners,*
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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BRIEF IN OPPOSITION OF RESPONDENTS

RELEVANT STATUTES

In addition to the statutory provisions reproduced in the petition, the following statutory provisions are relevant:

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 904 & 905 (1982):

> SEC. 4. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> SEC. 5. (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ., except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages . . . .

STATEMENT OF THE CASE

These cases are all common-law tort actions brought against respondent Washington Metropolitan Area Transit Authority ("WMATA"). Some of the actions were previously reviewed by this Court in *WMATA* v. *Johnson*, 467 U.S. 925 (1984). Indeed, the actions by the *Wilmes* group of petitioners are the very actions ordered dismissed by this Court in *Johnson*; the remaining petitioners' actions (the *Keener* and *Dennis* groups of cases) were previously stayed in the courts below pending this Court's decision in *Johnson*. *See* Petitioners' Appendix ("Pet. App.") 6a.[1]

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[1] One group of the instant actions (the *Dennis* cases) presented claims against so-called intermediate contractors, who are also respondents here. The D.C. Circuit held that intermediate contractors enjoy immunity under *Johnson* for the same reason as general contractors (Pet. App. 14a-16a); petitioners do *not* seek review of that determination. The intermediate contractor respondents join WMATA in this brief; for clarity, however, we will refer only to WMATA in our argument.

In *Johnson*, this Court held that WMATA is immune from actions such as petitioners' by virtue of Sections 4 and 5 of the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"),[2] as made applicable in the District of Columbia by the District of Columbia Workmen's Compensation Act of 1928 (the "1928 Act").[3] In reaching that decision, the Court (1) accepted the lower courts' conclusion that WMATA is a "contractor" within the meaning of Section 4(a) of the LHWCA; (2) adopted the "majority" view that contractors such as WMATA may in some circumstances be entitled to "employer" immunity under Section 5 of the LHWCA; and (3) held that under the plain language of Section 5 immunity is available to contractors so long as they have not defaulted on their contingent statutory duty to secure workers' compensation for their subcontractors' employees. 467 U.S. at 928 n.5, 936, 940. Noting that WMATA had "acted above and beyond its statutory obligations" to secure compensation by "purchasing 'wrap-up' insurance on behalf of all of its subcontractors," the Court "conclude[d] that WMATA [is] entitled to immunity from the tort actions brought by [the *Wilmes* petitioners]." *Id.* at 940.

Notwithstanding this Court's decision in *Johnson*, petitioners subsequently contended in the courts below that WMATA is not entitled to immunity in these cases for two reasons. First, they contended that Congress' 1984 amendments to Sections 4 and 5 of the LHWCA effectively denied immunity to District of Columbia contractors such as WMATA.[4] Second, in spite of this Court's

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[2] 33 U.S.C. §§ 904 & 905 (1982).

[3] D.C. Code §§ 36-501 *et seq.* (1973) (repealed 1982).

[4] *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (the "1984 Amendments"). Congress enacted the 1984 Amendments in September 1984, three months after this Court's *Johnson* decision. In the Amendments, Congress revised Section 4(a) of the LHWCA to provide that "only if [a] subcontractor fails to secure the pay-

contrary determination in *Johnson*, petitioners contended that WMATA is *not* a contractor within the meaning of Section 4 of the LHWCA. Rejecting both contentions, the District Court dismissed petitioners' cases, and the Court of Appeals unanimously affirmed. Pet. App. 23a-32a; 1a-16a.

In rejecting petitioners' contention that the 1984 Amendments apply to these 1928 Act cases, the courts below relied on the fact that in 1982 the District of Columbia City Council (with Congress' assent) repealed the 1928 Act in its entirety and replaced it with the District of Columbia Workers' Compensation Act of 1979 (the "1982 Act").[5] Accordingly, the United States Court of Appeals for the District of Columbia Circuit (Mikva, Bork & Buckley, JJ.) determined that any applicability of the 1984 Amendments to petitioners' cases "depends on what the D.C. Council intended when it passed the 1982 Act" (Pet. App. 10a), and that this issue therefore presented "a question of local law." *Id.* at 8a. It further found that this very question had already been "squarely addressed and conclusively decided by the District of Columbia's highest court" in *O'Connell* v. *Maryland Steel*

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ment of compensation shall the contractor be liable for and be required to secure the payment of compensation" for the subcontractors' employees. Pet. 4. Congress also added to Section 4(a) the limitation that "[a] subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor." *Id.* Furthermore, Congress amended Section 5(a) so that it now states that "a contractor shall be deemed the employer of a subcontractors' employees only if the subcontractor fails to secure the payment of compensation as required by Section 4 . . . ." *Id.*

[5] D.C. Code §§ 36-301 *et seq.* (1981). Although passed in 1979, the repeal of the 1928 Act did not take effect until 1982. Prior to the repeal, amendments to the national LHWCA governed 1928 Act cases by virtue of the 1928 Act's provision incorporating "all amendments that may hereafter be made" to the LHWCA. D.C. Code § 36-501 (1973) (repealed 1982).

Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 106 S. Ct. 1378 (1986). *Id.* at 8a-9a.

As the D.C. Circuit noted, in *O'Connell* the D.C. Court of Appeals held that the repeal of the 1928 Act prevented the 1984 Amendments from applying to the District because "'[i]n adopting the [1982 Act] the Council divorced the local worker's compensation system entirely from the [LHWCA].'" Pet. App. 10a, *quoting O'Connell*, 495 A.2d at 1141. Finding that the D.C. Court of Appeals' resolution of this local law question was owed deference by the federal courts, the D.C. Circuit concluded that "the 1984 Amendments do not reach the 1928 Act," and that therefore "the *Johnson* decision continues to control in all these cases." Pet. App. 16a.[6]

Regarding petitioners' contention that WMATA is not a "contractor" within the meaning of Section 4 of the LHWCA, the D.C. Circuit determined that *Johnson* is again controlling. In reaching that determination, the D.C. Circuit recognized that WMATA's contractor status "is a question of fact and law." Pet. App. 12a. It further recognized that in *Johnson* this Court held that WMATA's status as a general contractor "turns on a factual inquiry into WMATA's responsibility for supervising project construction" and that the record in *Johnson* amply supported the lower courts' findings that WMATA in fact had that responsibility. *Id.*, *citing Johnson*, 467 U.S. at 928 n.5. Noting that petitioners in these

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[6] The D.C. Circuit furthermore held that the D.C. Council's repeal of the 1928 Act "did not result in a forfeiture of the remedies available [to petitioners] *at the time* of repeal for injuries incurred prior to repeal . . . ." Pet. App. 11a (emphasis in original). Instead, the court held that due to the operation of the general saving statute, 1 U.S.C. § 109 (1982), petitioners "are entitled to the rights and benefits afforded by the 1928 Act as they then existed [at the date of repeal], and not as they might be modified by subsequent amendment." *Id.* Accordingly, these cases continue to be governed by the *unamended* versions of Sections 4 and 5 of the LHWCA, as incorporated by the 1928 Act and as construed by this Court in *Johnson*. *Id.* at 4a.

cases had conceded that "there are no material facts in dispute" and that "these undisputed facts, as they concern WMATA's responsibility for supervising project construction, are *the same ones* on the basis of which the Supreme Court concluded, in *Johnson*, that WMATA is a general contractor for purposes of immunity," the D.C. Circuit held that *Johnson* was controlling. Pet. App. 13a (emphasis added). It therefore affirmed the District Court's dismissal of the cases.

The full Court of Appeals unanimously denied petitioners' request for rehearing *en banc* on October 17, 1986, Pet. App. 17a-18a, and petitioners filed the instant petition for certiorari on January 15, 1987.

SUMMARY OF ARGUMENT

Petitioners have asked the Court to review three questions: (1) whether the 1984 Amendments are applicable to these 1928 Act cases; (2) whether *Johnson* should be overruled; and (3) whether on the record in these cases WMATA is a contractor within the meaning of the LHWCA. For several reasons, these questions are not sufficiently important to warrant this Court's review on certiorari.

First, the questions are of extremely limited application: they affect only tort cases brought against contractors in the District of Columbia and, in light of the D.C. Council's repeal of the 1928 Act, the questions are further limited to cases based on pre-July 26, 1982 claims that are not yet time-barred by the District's three-year statute of limitations. Second, the questions ultimately turn on local issues of law previously resolved by the District of Columbia Court of Appeals, and as to which this Court has a strong policy of deference. Third, the questions ask the Court to reconsider its own prior *Johnson* decision without even approaching the standard necessary for such reconsideration. And finally, the unani-

mous judgment of the D.C. Circuit is clearly correct and is in accord with *every* court that has considered the questions presented. For all these reasons, the petition should be denied.

REASONS FOR DENYING THE WRIT

1. The Question of the 1984 LHWCA Amendments' Applicability to the District of Columbia Does Not Merit This Court's Review.

The principal question presented by petitioners for review is whether Congress' 1984 Amendments to Sections 4 and 5 of the LHWCA apply to these 1928 Act District of Columbia cases. This question is of such limited application that it affects very few cases beyond those actually presented here. By definition, the question affects *only* (a) those tort actions (b) arising in the District of Columbia (c) against contractors who have not secured compensation, (d) which are based on pre-July 26, 1982 claims (*i.e.*, claims arising prior to the effective repeal of the 1928 Act) and that (e) are not yet time-barred by the District's three-year statute of limitations (D.C. Code § 12-301(8) (1981)).[7] Such an esoteric question of extremely limited application does not merit this Court's review.[8]

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[7] Petitioners imply that the decision below is dispositive not only in tort actions against contractors, but also in administrative proceedings to settle compensation claims. This assertion is premature. The D.C. Circuit vacated the decision of the Benefits Review Board in *Gardner* v. *Railco Multi Construction Co.* (relied on by petitioners at Pet. 18), to allow the Board to reconsider the question of the 1984 Amendments' applicability to compensation claims. *See Gardner* v. *Railco Multi Construction Co.*, No. 86-1352 (D.C. Cir. Dec. 17, 1986). The matter is still before the Board and may therefore be considered again by the D.C. Circuit. Hence, the issue of the 1984 Amendments' application to compensation claims is not ripe for this Court's review.

[8] One indication of the limited impact the issues presented have beyond the present cases is that WMATA—one of the largest con-

Moreover, the local law question of the 1984 Amendments' applicability to these 1928 Act cases has already been definitively determined by the D.C. Court of Appeals in *O'Connell*, and this Court denied certiorari on the issue. *See* 106 S. Ct. 1378 (1986).[9] The D.C. Circuit simply deferred to *O'Connell* in these cases, and nothing asserted by petitioners demonstrates that this Court should not defer to *O'Connell* as well.[10] Accordingly, this Court's well-established policy of declining to review "decisions of the courts of the District involving matters of peculiarly local concern" counsels strongly against a grant of certiorari. *Pernell* v. *Southall Realty*, 416 U.S. 363, 366

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tractors in the District of Columbia—has had extremely few tort actions brought against it since July 25, 1985, the expiration of the three-year limitations period following the effective date of the 1928 Act's repeal (July 26, 1982).

[9] In *O'Connell*, the plaintiffs sought certiorari review on the question "[w]hether the 'Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984' are applicable to Workers' Compensation claims governed by the provisions of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 *et seq.* as made applicable to the District of Columbia by virtue of D.C. Code §§ 36-501 *et seq.* (1973)." Petition for Writ of Certiorari, *O'Connell* v. *Maryland Steel Erectors, Inc.*, No. 85-1216. This question is substantively identical to the question presented in these cases.

[10] As the D.C. Circuit determined, resolution of the question presented "depends on what the D.C. Council intended when it passed the 1982 Act," which repealed the 1928 Act (including that Act's provision incorporating future amendments to the LHWCA as the general compensation law for the District). Pet. App. 10a. The intent of the D.C. Council with respect to local compensation law obviously raises no issue of national concern or application. In addition, the question of the 1984 Amendments' applicability to 1928 Act cases would require the Court to determine whether Congress, in enacting those amendments, intended to act as local legislature for the District and "reinstate a law that the D.C. Council repealed in a valid exercise of its powers under the District of Columbia Self-Government Act of 1973 . . . ." Pet. App. 10a-11a. This question, too, is of concern exclusively within the District, and presents no issue of national applicability.

(1974). *See generally Whalen* v. *United States*, 445 U.S. 684, 687 (1980); *United States* v. *Frady*, 456 U.S. 152, 159 (1982).[11]

Furthermore, there is no conflict among the courts as to the inapplicability of the 1984 Amendments to 1928 Act cases. To the contrary, in agreeing with the D.C. Court of Appeals' *O'Connell* decision, the D.C. Circuit acted in accordance with *every other court* that has examined the question of the 1984 Amendments' relevance to 1928 Act cases.[12] Review by this Court is therefore not required to clarify the law or resolve a conflict on this question.

In addition, certiorari review is not warranted because the D.C. Circuit's determination that the 1984 Amendments do not apply to 1928 Act cases is plainly correct. Petitioners challenge that determination on the premise that "[t]hese cases are governed by the LHWCA itself," and, therefore, all future amendments to the LHWCA

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[11] The purely local nature of the question whether the 1984 Amendments apply in the District stands in sharp contrast to the issue presented in *Johnson, i.e.*, the meaning of Sections 4 and 5 of the LHWCA, as incorporated by the 1928 Act. The latter issue required construction of statutory provisions of nationwide applicability, and therefore was appropriately reviewed by this Court. *See generally* pages 14-15, *infra*.

[12] For other decisions holding the 1984 Amendments inapplicable to 1928 Act cases, *see Holmes* v. *Leon N. Weiner & Assoc., Inc.*, 603 F. Supp. 122, 124 n.4 (D.D.C. 1985); *Stokes* v. *George Hyman Constr. Co.*, C.A. No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir.); *Lehew* v. *AFGO Eng'g Corp.*, C.A. No. 81-1593 (D.D.C. Feb. 27, 1985), *appeal filed*, No 85-5304 (D.C. Cir.); *Estep* v. *Construction Gen., Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. Apr. 3, 1985); *Montag* v. *Fischbach & Moore Corp.*, C.A. No. 4643-83 (D.C. Sup. Ct. Feb. 13, 1985); *Hatter* v. *George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984); and *McNeill* v. *WMATA*, Case Nos. 84-DCWC-51, 522 (Dep't of Labor, Feb. 22, 1985). As petitioners have noted, the *Estep* decision is presently on appeal before the District of Columbia Court of Appeals. *See* Pet. 22 n.25.

must necessarily apply in the District. Pet. 13. But as previously noted, the LHWCA (and amendments to it) were made applicable to the District *only* by virtue of the "wholly separate and distinct" 1928 Act. *Gudmundson* v. *Cardillo*, 126 F.2d 521, 525 (D.C. Cir. 1942); *accord Johnson*, 467 U.S. at 928 n.4; *Del Vecchio* v. *Bowers*, 296 U.S. 280, 282 n.2 (1935); *Harrington* v. *Moss*, 407 A.2d 658, 659-60 (D.C. 1979). Indeed, petitioners concede that this is so.[13] Thus, when the D.C. Council repealed the 1928 Act in its entirety in 1928, it removed the "bridge" between 1928 Act cases and any post-1982 amendments to the national statute.[14] As the D.C. Circuit held, "because the 1928 Act was no longer in existence to extend the reach of the 1984 amendments beyond the Longshoremen's Act itself," those amendments simply are of no moment to these and other 1928 Act cases. Pet. App. 10a.

Nor does the applicable saving statute, 1 U.S.C. § 109 (1982), serve as a means for applying the 1984 Amendments to these cases.[15] As this Court held in *De La*

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[13] Pet. 5 n.1 ("The LHWCA was extended to local District of Columbia cases by the [1928 Act]").

[14] As the District of Columbia Court of Appeals aptly stated:

> Had it not been for the repealer, the 1928 act would indeed have incorporated those [1984] amendments . . . . But as the 1928 act was no longer on the books, what Congress subsequently did to the Longshoremen's statute did not affect any rights created by such prior law.

O'Connell, 495 A.2d at 1142.

[15] Petitioners dispute whether the saving statute in fact applies to this case at all, and contend that "there is no evidence that [Congress or the D.C. Council] . . . intended" it to apply. Pet. 16. If that statute does not apply, however, then the D.C. Council's repeal of the 1928 Act would extinguish *all* of petitioners' rights and claims. *See generally* 1A N. Singer, *Sutherland Statutory Construction* § 23.33 (1985). Moreover, under well-settled rules of statutory construction, in the *absence* of indications to the con-

Rama Steamship Co. v. *United States*, 344 U.S. 386 (1953), the saving statute addresses "the implications for *existing rights* of the repeal of the law which created them," by keeping that law "alive" for the "precise purpose" of "sustaining any proper action . . . for the enforcement" of those existing rights. *Id.* at 389 (emphasis added).[16] As the D.C. Circuit held, this is *precisely* the role the saving statute has performed in these cases: "D.C. workmens' compensation claimants seeking damages for pre-July 26, 1982 injuries are entitled to the rights and benefits afforded by the 1928 Act as they then existed [at the time of repeal], and not as they might be modified by subsequent amendment." Pet. App. 11a. *See also id.* at 4a.

Despite this well-settled rule,[17] petitioners assert that the saving statute preserves "*all* future rights and lia-

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trary, the Council and Congress may be presumed to have intended the saving statute to operate when they repealed the 1928 Act:

> Since all legislatures are presumed to act with a knowledge of existing law, it is presumed that they act with reference to any general saving statute. Thus, when a repeal is enacted unaccompanied by a . . . saving clause it is presumed that the legislature has acted with the intent to provide the protection found in the general saving statute.

2A N. Singer, *Sutherland Statutory Construction* § 47.13 (1984). *See, e.g., Brice* v. *State*, 669 P.2d 1311, 1315 (Alaska 1983).

[16] Section 109 provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109 (1982).

[17] *See, e.g., Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 162 (1920); *The Irresistible*, 20 U.S. (7 Wheat.) 551, 551-52 (1822); *Solomon* v. *United States*, 276 F.2d 669, 673 (6th Cir.), *cert. denied*,

bilities," including all "*changes in the law.*" Pet. 19 (emphases in original). This assertion not only contradicts the language of the saving statute,[18] but it also renders the repeal of the 1928 Act meaningless; *i.e.*, under petitioners' theory all "changes in the [LHWCA]" continue to apply to the District notwithstanding the total repeal of the law that had made such changes applicable. This is not a theory that deserves the Court's serious attention.[19]

Finally, an important underpinning of the D.C. Circuit's decision—as well as that of the Court of Appeals in *O'Connell*—was those courts' refusal to extend Congress' *express* revision of the national LHWCA to 1928 Act cases in the absence of *any* affirmative indication that either Congress or the City Council intended such a result. *See* Pet. App. 10a-11a; *O'Connell*, 495 A.2d at 1141-42. As petitioners themselves point out, under the District's Self-Government Act Congress retains plenary power to act at any time and on any matter as legislature for the District. *See* D.C. Code § 1-206 (1981), *cited at* Pet. 20 n.22. Furthermore, the courts have confirmed that the D.C. Council has concomitant authority

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364 U.S. 890 (1960); *Marquardt* v. *Stark*, 239 Minn. 107, 58 N.W.2d 273, 277 (1953); *Shanken* v. *Township of Upper Moreland*, 203 Pa. Super. 323, 201 A.2d 249, 252 (1964), *aff'd*, 418 Pa. 627, 211 A.2d 283 (1965).

[18] The saving statute certainly does not save "future" rights; by its terms it saves only rights previously "incurred." *See* note 16, *supra.*

[19] Petitioners incorrectly allege that neither the D.C. Circuit in its decision below nor the D.C. Court of Appeals in *O'Connell* analyzed the saving statute or this Court's decisions construing that statute. Pet. 16 & n.16. In fact, both courts analyzed the saving statute's impact on the cases before them, and the D.C. Circuit expressly relied upon this Court's *De La Rama* decision in reaching its determination that the saving statute does not make the 1984 LHWCA Amendments applicable to 1928 Act cases. *See* Pet. App. 11a; *O'Connell*, 495 A.2d at 1141-42.

to amend the 1928 Act or otherwise legislate with respect to any matter affecting workers' compensation matters in the District.[20] Nevertheless, neither legislature has taken action in the wake of *Johnson* to revise District law.[21]

This inaction by Congress and the D.C. Council stands in telling contrast to Congress' amendment of the national LHWCA expressly to limit contractor immunity to cases where the contractor actually secures compensation. Petitioners complain that this contrast results in an "anomaly." Pet. 11. But different legal standards between the District's compensation laws and the national LHWCA are an inevitable and deliberate result of the D.C. Council's decision to "divorc[e] the local workers' compensation system entirely from the Longshoremen's Act." *O'Connell*, 495 A.2d at 1141. The D.C. Circuit recognized this, and so declined "to reinstate a law [*i.e.*, the 1928 Act] that the D.C. Council repealed in a valid exercise of its powers . . . and as to which Congress declined to exercise its reserved right of veto." Pet. App. 10a-11a (citation omitted). It is submitted that this Court likewise should leave adjustments in the District's compensation laws to the D.C. Council and/or Congress; certiorari review is not an appropriate vehicle for such adjustments.

In summary, the D.C. Circuit's deference to *O'Connell* on this very narrow issue of local law was sound and

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[20] *District of Columbia* v. *Greater Washington Central Labor Council*, 442 A.2d 110, 120 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983).

[21] Accordingly, petitioners' claim (Pet. 18 n.19) that the decision below means that "ongoing claims [will] be locked into a [prior] version of the LHWCA" is completely unfounded. Both the D.C. Council and Congress may legislate changes with respect to the legal standards governing pre-1982 injuries at any time; they simply have chosen not to do so either in immediate reaction to *Johnson* or in the more than two years since the District Court first held the 1984 Amendments to be without effect in the District.

produced the correct result. Hence, this issue is not of sufficient importance to merit this Court's consideration.

2. Petitioners Have Not Demonstrated Grounds Warranting This Court's Reconsideration of *Johnson*.

As an alternative basis for certiorari, petitioners urge this Court to reconsider its *Johnson* decision. Besides the fact that *Johnson*'s application is now limited to the District of Columbia and therefore is not of sufficient importance to warrant a second review, petitioners' grounds for seeking such a review are in any event without merit.

Petitioners' primary contention is that this Court should never have decided *Johnson* in the first place, but instead should have deferred to the D.C. Court of Appeals' decision in *DiNicola* v. *George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). *DiNicola* had held that general contractors not actually called upon to secure compensation under the 1928 Act are not entitled to immunity from tort suits by subcontractor employees.[22] Petitioners concede that *Johnson* "in effect overrule[d] *DiNicola*", but nevertheless argue that "[i]f . . . this case is governed by local law, as was held below, this Court's *Johnson* decision has been undermined by this Court's failure to defer to the *DiNicola* rule." Pet. 21-22. That is, petitioners apparently contend that *Johnson* undermines *Johnson*. This argument is patently untenable.

Moreover, petitioners' assumption that *Johnson* presented only local law issues fails to comprehend that

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[22] Petitioners incorrectly assert that "*DiNicola* had held that contractors are *not* entitled to immunity under the LHWCA." Pet. 14 (emphasis in original). As this Court recognized in *Johnson*, however, *DiNicola* held that in some circumstances contractors *are* entitled to employer immunity under the statute. *See* 467 U.S. at 933-34. Indeed, this Court in *Johnson* agreed with *DiNicola* on this crucial point. *Id.* *Johnson* differs with *DiNicola* only as to the particular circumstances in which contractors are immune.

while *some* 1928 Act cases do present purely local issues (*e.g.*, *O'Connell*), other 1928 Act cases present federal questions (*e.g.*, *Johnson*). This Court recognized the distinction over half a century ago in *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), a case heavily relied on by petitioners (Pet. 13-14). In *Del Vecchio*, the Court noted that because a 1928 Act case that requires the Court to construe the substantive provisions of the national LHWCA would have nationwide impact and would "constitut[e] a precedent of general application," certiorari review of such cases would be appropriate. 296 U.S. at 285. The Court furthermore contrasted this circumstance with a 1928 Act issue that would be "confined in its operation to the District of Columbia." *Id.* In addition, the Court more recently reaffirmed the dichotomy between decisions of the local courts "involving matters of peculiarly local concern" and those that present "a problem of general federal law of nationwide application" in *Pernell* v. *Southall Realty*, 416 U.S. at 366. *Johnson*'s construction of Sections 4 and 5 of the *nationally applicable* LHWCA is clearly in the latter category.

Thus, petitioners' suggestion that an inconsistency exists between this Court's failure to defer to *DiNicola* in *Johnson* and the D.C. Circuit's deferral to *O'Connell* in these 1928 Act cases is incorrect. As explained earlier, the issue of the 1984 Amendments' applicability to 1928 Act cases is of relevance only in the District of Columbia. Unlike *Johnson*'s construction of Sections 4 and 5, resolution of the issue in this case therefore will not create a "precedent of general application." *Del Vecchio*, 296 U.S. at 285. Hence, petitioners' claim that *Johnson* should be reconsidered in favor of *DiNicola* does not merit this Court's review.[23]

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[23] Petitioners also claim that *Johnson* should be reconsidered in light of the criteria identified in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). While those criteria are pertinent once the Court has already chosen to reconsider a prior decision,

3. The Courts Below Properly Held WMATA to Be a Contractor.

Finally, as was also true in *Johnson*, the present petitioners, "[d]espite contrary findings by the District Courts and Court of Appeals, . . . persist in arguing that WMATA is not a general contractor for purposes of the LHWCA." 467 U.S. at 928 n.5. Specifically, petitioners urge the Court to grant certiorari to examine—

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they do not by themselves demonstrate that either the "special justification" necessary for reconsideration has been shown or that the "exceptional action" of overruling a recent case is warranted. *See Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984).

In any event, the *Monell* criteria do not support the overruling of *Johnson*. First, because *Johnson* was decided primarily on the basis of the statute's plain language, petitioners' belated assertion that the Court misapplied the LHWCA's legislative history in *Johnson* is both wrong and irrelevant. Second, while Congress limited *Johnson* by amending the *national* LHWCA, neither Congress nor the D.C. Council has otherwise expressed any intent that *Johnson*'s rule should be changed in *local* 1928 Act cases. The plain, unamended language construed in *Johnson* therefore continues to govern these cases, and petitioners advance no reason why the Court should read that plain language differently today.

Third, as the leading authority on workers' compensation law has stated, this Court's *Johnson* decision did *not* constitute a departure from prior precedent. To the contrary, *Johnson* was part of the "marked trend in more recent times toward granting immunity to the general contractor when the subcontractor was insured, and even where compensation has been actually paid under the subcontractor's policy." 2A A. Larson, *The Law of Workmens' Compensation* § 72.31(b) at 14-119 to 14-131 and nn.49 & 50 (1986) (citing approximately thirty state and federal cases in support of the "marked trend").

Finally, through its wrap-up insurance program WMATA has provided nearly $135 million in no-fault compensation benefits to employees of its over 3,000 subcontractors, including significant amounts paid in reliance on *Johnson*'s holding that the wrap-up program will entitle WMATA to immunity from suits by injured subcontractor employees. Thus, even under the *Monell* criteria petitioners have not met their burden of showing that the drastic action of overruling a recent prior decision should be considered by the Court.

for a second time—the question whether a single entity (WMATA) in a single jurisdiction (the District of Columbia) is a general contractor for purposes of cases arising under the reepaled 1928 Act. This issue plainly is not of sufficient importance to warrant certiorari under this Court's Rule 17. Moreover, each of the three reasons asserted by petitioners as a basis for review of this question is entirely meritless.

First, petitioners allege that "the Court of Appeals erred in failing to reverse the District Court for refusing to allow the plaintiffs discovery under Rule 26 . . . ." Pet. 27. This argument ignores the record. These cases came before the District Court on an order to the petitioners to show cause why their actions should not be dismissed pursuant to *Johnson*. Pet. App. 58a. In response, petitioners could have—*but did not*—request discovery if they believed additional factual development was necessary for their cases.[24] Quite to the contrary, petitioners moved for summary judgment on the contractor issue, requesting the trial court to "rule, as a matter of law, that WMATA is not a contractor within the meaning of Section 904(a) of the Act."[25] Moreover, petitioners expressly conceded to the D.C. Circuit that "there are no material facts in dispute" in these cases. Pet. App. 13a. In such circumstances, petitioners should not be heard to complain that the courts below *sua sponte* should have ordered additional discovery on their behalf.

Second, petitioners allege that "the Court of Appeals erred in stating that this Court found WMATA to be a

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[24] The show cause order merely precluded additional discovery during the time that order was pending; it did *not* prevent petitioners from identifying the need for further discovery as a reason why the cases should not be dismissed pursuant to *Johnson*. *See* Pet. App. 58a.

[25] Plaintiffs' Response to the Court's Show Cause Order and Motion for Partial Summary Judgment at 3.

contractor 'as a matter of law' in *Johnson*." Pet. 28. What the Court of Appeals actually stated was that "WMATA's status is a question of fact and law," and that on the factual record before it the court was "as a matter of law . . . required by *Johnson* to find that WMATA is a general contractor." Pet. App. 12a-13a. The court reached this inescapable conclusion in view of (1) this Court's determination in *Johnson* that the record in *that* case "ampl[y] support[ed]" the determination "that WMATA is a general contractor for purposes of Section 4(a) of the LHWCA," 467 U.S. 928 n.5; and (2) the fact that the *same* factual materials relied on in *Johnson* stand undisputed in the record in these cases. Pet. App. 13a.

Third, petitioners nevertheless assert that "the Court of Appeals erred in stating that the record in this case was the same as in *Johnson*." Pet. 28. Furthermore, petitioners allege that in response to their summary judgment motion on the contractor issue, "WMATA submitted *nothing* in response." Pet. 29 (emphasis in original). These assertions are false. The only arguably pertinent difference between the record in these cases and the record in *Johnson* is the addition by petitioners of an irrelevant affidavit that petitioners maintain "tend[s] to show that WMATA is not a contractor', but an 'owner'." Pet. 29.[26] Moreover, the record clearly demonstrates not only that WMATA responded to that affidavit, but that it did so by filing with the trial court

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[26] The affidavit relied on by petitioners (*see* Pet. App. 59a-61a) is irrelevant because it addresses only whether WMATA might qualify as a "general contractor" for purposes of general construction industry practices—not the distinct question whether WMATA is a "contractor" within the meaning of Section 4 of the LHWCA. Thus, even if all of the assertions made in the affidavit are taken as true, WMATA would still prevail in this case because this Court has already determined *on the basis of the evidence in this record* that WMATA had the requisite supervisory authority on the Metro subway project to qualify as a Section 4 "contractor."

the *precise evidence* relating to the contractor issue that had been relied on by this Court and the lower courts in *Johnson*.[27] Thus, the D.C. Circuit was entirely correct in stating that:

> [a]s appellants concede . . . 'there are no material facts in dispute' in this case; and these undisputed facts, as they concern WMATA's responsibility for supervising project construction, are the same ones on the basis of which the Supreme Court concluded, in *Johnson*, that WMATA is a general contractor for purposes of determining its entitlement to Longshoremen's Act immunity. [Pet. App. 13a (citation omitted).][28]

The "contractor" issue was therefore decided correctly by the D.C. Circuit, and in any event is not worthy of review on certiorari.

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[27] *See* WMATA's Reply to the Plaintiffs' Response to the Court's Show Cause Order and Motion for Partial Summary Judgment at 35-41 and Exhibits U-W; WMATA's Counterstatement of Material Facts About Which There Is No Genuine Issue.

[28] Petitioners' reliance on *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548 (1986), is also misplaced. *Catrett* addressed the question of the evidentiary support necessary to carry a motion for summary judgment, and concluded that a party moving for summary judgment is not obliged to support that motion with affidavits or other similar materials. *Id.* at 2553. Rather, summary judgment should be granted "so long as whatever is before the district court demonstrates" that there is no genuine issue for trial. *Id.* Thus, *Catrett* addresses *petitioners'* burden in supporting their motion for summary judgment on the contractor issue, not WMATA's burden in responding to it. In any event, as all parties agreed below, there are *no* material disputed facts related to the contractor issue.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert B. Cave, a member of the Bar of this Court, hereby certify that three (3) copies of the "Brief in Opposition of Respondents" were mailed, first-class postage prepaid, this 17th day of February, 1987, to:

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